No. 18-15

IN THE

Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

PETER O'ROURKE,
ACTING SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS, AMERICAN FARM BUREAU FEDERATION, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, AND NATIONAL MINING ASSOCIATION, SUPPORTING PETITIONER

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BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS *ET AL.* SUPPORTING PETITIONER

INTEREST OF *AMICI CURIAE*

Amici Curiae are a group of unrelated business associations whose members are regularly affected by the doctrine of *Auer* deference.[1] They are the National Association of Home Builders, American Farm Bureau Federation, the National Association of Manufacturers,

[1] Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person or persons other than *amici* and their counsel made such a monetary contribution. Amici affirm that counsel of record for all parties were timely notified of, and granted consent for, the filing of this brief.

National Cattlemen's Beef Association, and the National Mining Association.

Across the United States, the individuals and companies who form the membership of each of the *amici* find themselves regulated by multiple federal agencies. *Amici* therefore have a substantial interest in ensuring that agencies regulate only in a direct, clear, fair, and lawful manner—and that courts do not defer to agencies when deference is not due. This case presents an opportunity for this Court to reconsider whether, or to what extent, so-called "*Auer* deference" appropriately reflects the comparative responsibility of agencies and the judiciary.

Auer deference has become an increasingly common tool for agencies to alter their authority over a host of subjects, ranging from the veteran's benefits issues here to every major regulatory category. *Amici*'s members frequently have been affected when an agency reinterprets its regulations in a manner that fundamentally changes settled understandings—and does so without using the mechanisms that the Administrative Procedure Act (APA) required for enacting those regulations in the first place. While the comparatively rigorous standards of notice-and-comment rulemaking do not eliminate the risk of regulatory overreach, they do foster a meaningful check on agency power by requiring public participation and the development of an administrative record that facilitates judicial scrutiny of agency action.

But the principles of deference articulated in *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and extended in *Auer* v. *Robbins*, 519 U.S. 452 (1997), provide no such assurances. Those cases have enabled—and tacitly *encouraged*—erosion of the judiciary's role in assessing executive assertions of authority. *Amici* respectfully urge the Court to grant the petition to reevaluate the legitimacy of this doctrine.

1. The National Association of Home Builders (NAHB) is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals are providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers, and its builder members construct about 80 percent of all new homes built each year in the United States. The remaining members are associates working in closely related fields within the housing industry, such as mortgage finance and building products and services. NAHB frequently participates as a party litigant and *amicus curiae* to safeguard the constitutional and statutory rights and economic interests of its members and those similarly situated.

2. The American Farm Bureau Federation (AFBF), headquartered in Washington, D.C., was formed in 1919 and is the largest nonprofit general farm organization in the United States. Representing about six million member families in all fifty states and Puerto Rico, AFBF's members grow and raise every type of agricultural crop and commodity produced in the United States. Its mission is to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. To that end, the AFBF regularly participates in litigation, including as *amicus curiae* in this and other courts, to give voice to its members.

3. The National Association of Manufacturers (NAM), based in Washington, D.C., is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all fifty states. Manufacturing employs more than twelve million men and women, contributes $2.25 trillion

to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

4. The National Cattlemen's Beef Association (NCBA), based in Centennial, Colorado, is the largest and oldest national trade association representing American cattle producers. Through state affiliates, NCBA represents more than 175,000 of America's farmers and ranchers, who provide a significant portion of the nation's supply of food. NCBA works to advance the economic, political, and social interests of the U.S. cattle business and to be an advocate for the cattle industry's policy positions and economic interests.

5. The National Mining Association (NMA), based in Washington, D.C., is a national trade association whose members include the producers of most of America's coal, metals, and industrial and agricultural minerals; the manufacturers of mining and mineral-processing machinery, equipment, and supplies; and engineering and consulting firms, financial institutions, and other firms serving the mining industry. NMA often participates in litigation raising issues of concern to the mining community.

Amici echo petitioner's arguments that the Court should grant the petition and definitively resolve the lingering doubt about *Auer*'s continuing viability by either abandoning or significantly narrowing the doctrine. The concrete examples of *Auer*'s seen and unseen harms provided below do not replace the legal analysis undertaken by petitioners and many others—they serve to illustrate why that analysis justifies action.

SUMMARY OF ARGUMENT

The Court is well acquainted with the jurisprudential arguments contesting *Auer*'s legitimacy, which alone justify further review. *Amici*, however, focus on *Auer*'s real-world consequences, which remain largely hidden from view despite deeply affecting millions of Americans.

Auer's legitimacy is more than a theoretical debate. When an agency invokes *Auer*—whether by name or not—it claims the power to interpret the words of its own regulations, regardless of prior positions or the public's prior understanding. The potential impacts of *Auer*'s continued application are significant. Judicial decisions memorialize a host of examples where casual reliance on *Auer* determines enormous stakes. But reported cases reflect only a fraction of *Auer*'s consequences, spanning criminal liability, monetary costs, civil rights, a lawful immigrant's right to remain in the United States, or, in petitioner's case, a Vietnam veteran's receipt of benefits.

Auer's reach is felt most deeply during routine interactions between the regulated community and federal agencies. Those facing an agency's questionable interpretation of an arguably ambiguous regulation know (or soon will learn) that *Auer* looms. They are quickly left with little practical choice but to capitulate. Courts reinforce that defensive posture by frequently illustrating that challenges to an agency's interpretation of its rules are almost futile. *Auer*'s greatest power lies not in judicial decisions, therefore, but in dissuading individuals and business from ever turning to the courts for relief.

The Court should grant the petition and definitively resolve the lingering doubt about *Auer*'s continuing viability by either abandoning or significantly narrowing it.

ARGUMENT

The *Auer* doctrine has long permitted federal agencies to expand the scope of their regulatory and enforcement

power with little or no notice to (much less comment from) the individuals and businesses most affected. Under this doctrine, the Court defers to an agency's interpretation of its own regulations unless that interpretation is plainly erroneous or flatly inconsistent with a regulation's text. *Decker* v. *Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 613 (2013). Stated differently, an agency's interpretation of its regulation will almost always prevail, even when it is not the most obvious or most rational legal interpretation, if the agency can find any ambiguity in its original language.[2] This means that the regulated community cannot safely rely on the application of the obvious or most legally sound interpretation in making significant decisions that will affect their livelihoods.

Under *Seminole Rock*, this doctrine applied "exclusively in the price control context and only to official agency interpretations," but as *Auer* exemplifies, the Court "expanded it to many contexts and to informal interpretations." *Garco Const., Inc.* v. *Speer*, 138 S. Ct. 1052, 1052 (2018) (Thomas, J., dissenting from denial of certiorari) (internal quotation marks and citation omitted). *Auer*'s increasing grasp has engendered substantial uncertainty and unfairness, despite having a questionable doctrinal foundation. Members of this Court, like judges and scholars across the nation, accordingly have expressed serious doubts about *Auer*'s continuing legitimacy. *Id.* at 1053 ("By all accounts, *Seminole Rock* deference is 'on its last gasp.' Several Members of this

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[2] A judge's threshold determination about clarity versus ambiguity—whether in a statute or a regulation—can therefore have significant consequences for individuals and businesses. See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2153 (2016) (acknowledging in the *Chevron* context that "[the] simple threshold determination of clarity versus ambiguity may affect billions of dollars, the individual rights of millions of citizens, and the fate of clean air rules, securities regulations, labor laws, or the like").

Court have said that it merits reconsideration in an appropriate case.") (citations omitted); *Decker*, 568 U.S. at 615 (Roberts, C.J., joined by Alito, J., concurring) (recognizing the "serious questions about the principle set forth in [*Seminole Rock* and *Auer*]" and stating that "[i]t may be appropriate to reconsider that principle in an appropriate case").

This skepticism is well justified. As illustrated in the examples below—in many of which *amici* here participated—*Auer* is an experiment whose time has passed.

I. Past Judicial Decisions Show That *Auer* Significantly Harms Businesses And Individuals

Businesses and individuals routinely make decisions in the face of uncertainty flowing from market forces, third-party decisionmaking, and other variables. The *Auer* doctrine has added an additional, unjustifiable, and especially problematic layer of uncertainty to this calculus for those regulated by federal agencies. Because *Auer* not only allows those agencies to alter their prior regulatory interpretations without public notice or comment, but also to retroactively enforce novel positions, its risks are always attendant.

While retaining attorneys and filing lawsuits mitigates some risk, even hiring "an army of perfumed lawyers" cannot eliminate the potential for fluctuating regulatory interpretations or retroactive administrative adjudications that are dictated by "the shift of political winds." *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). Those unable to retain counsel are left in an even more precarious state. This present reality is untenable and unfair. As aptly stated by the late Justice Scalia, the very author of *Auer* who came to see its flaws: "Enough is enough." *Decker*, 568 U.S. at 616 (Scalia, J., concurring in part and dissenting in part).

A. *Auer* promotes judicial abdication and can generate crippling economic consequences

The central critique of the *Auer* doctrine is its concentration of power to both make and interpret the law into a single branch of government. *Talk Am., Inc.* v. *Mich. Bell Tel. Co.*, 564 U.S. 68 (2011) (Scalia, J., concurring) ("[W]hen an agency promulgates an imprecise rule, it leaves to itself the implementation of that rule, and thus the initial determination of the rule's meaning .... It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well.") (internal citations omitted); see also *Gutierrez-Brizuela*, 834 F.3d at 1155 (Gorsuch, J.) (quoting The Federalist No. 47: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny."). This concentration of power invades what has for over two centuries been "emphatically the province and duty of the judicial department[:] to say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see also *Decker*, 568 U.S. at 616 (Scalia, J., concurring in part and dissenting in part) ("For decades, and for no good reason, we have been giving agencies the authority to say what their rules mean.").

By merging these powers, *Auer* can result in the imposition of serious economic harms on regulated entities, if not at an agency's whim, at least without an agency's careful or transparent analysis. And *Auer* allows for such consequences to flow not from a court's scrutiny of the text of regulations to ensure consistent application and the protection of reliance interests, but instead from the judiciary yielding to novel interpretations by the rules' own drafters

The present case is notable because the panel below was quite open about *Auer* being decisive. See Pet. App. 17a (maj. op.), 47a-48a (dissenting op.). Another case

that was comparably candid was *Eisai, Inc.* v. *U.S. Food & Drug Administration*, 134 F. Supp. 3d 384 (D.D.C. 2015). The loss of potentially hundreds of millions of dollars that would come from exclusive rights over a pharmaceutical at issue in *Eisai* turned on the court's conclusion that strong arguments were "insufficient to compel the Court to cast aside the high level of deference that *Auer*" requires, which it is "bound to follow . . . until the Supreme Court modifies the relevant standard." *Id.* at 394 n.2, 395. Because the court detected some regulatory ambiguity, *id.* at 394, it felt bound by *Auer* to disregard arguments that the court itself credited as "substantial," "not without merit," and otherwise probative, *id.* at 395-397.

As *Eisai* illustrates, *Auer* can lead courts to suspend meaningful scrutiny of agency action even when the regulated community has the better argument *and* stands to lose a great deal by virtue of the new agency "interpretation" of its own regulation. *Auer* can also lead to a related form of judicial abdication, where deference to an agency's interpretation of its regulation is essentially a foregone conclusion.

For example, in *Cape Hatteras*, a district court applied *Auer* and upheld the U.S. Fish and Wildlife Service's designation of 126 linear miles of shoreline in North Carolina as critical habitat for wintering piping plovers over challenges filed by two North Carolina counties. *Cape Hatteras Access Pres. All.* v. *U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 115-116 (D.D.C. 2004).[3] The coastal counties, which depended on the combined annual revenue of $386 million from tourism, sued the Service to preclude the possibility of beach closures, expensive and time-consuming consultation under the Endangered Species

[3] Piping plovers spend 10 months each year on migratory routes and wintering grounds. *Cape Hatteras*, 344 F. Supp. 2d at 115.

Act, and adverse impacts on land use and recreational and commercial uses of the designated areas. *Id.* at 116.

Plaintiffs contended that the Service's adoption of mean lower water lines and vegetation lines as boundaries violated the agency's regulations prohibiting the use of "[e]phemeral reference points" (*e.g.*, trees and sand bars) to define critical habitat for the plovers. *Id.* at 125-126. The Service argued that the lines were not ephemeral because "though they may shift over time, they will always exist." *Id.* at 126. Deeming "ephemeral" to be ambiguous, the district court invoked *Auer* and ruled in favor of the agency within the span of a single paragraph.[4]

Cases that apply *Auer* to the detriment of regulated entities are not uncommon. As Chief Justice Roberts explained, "[q]uestions of *Seminole Rock* and *Auer* deference arise as a matter of course on a regular basis." *Decker*, 568 U.S. at 616. This includes, of course, not just blockbuster cases, but also "smaller" ones that affect individual livelihoods. For instance, the real-world implications of agency interpretations involving critical habitat designations can be severe for cattlemen, who are forced to fence off rivers—at great personal expense and incon-

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[4] See also *Home Builders Ass'n of N. Cal.* v. *U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 991 (9th Cir. 2010). In 2002, the Service designated half a million acres in California and Oregon as a critical habitat for vernal pond crustaceans. *Id.* at 991. In designating the critical habitat for vernal pond crustaceans, the Service described the area, but vaguely stated "[a]ny such structures inadvertently left inside critical habitat boundaries are not considered part of the unit." 70 Fed. Reg. 46,924, 46,943 (Aug. 11, 2005). The designation was confusing and affected land prices within the designated area, which at first-glance would have appeared to be covered. Plaintiffs challenged the designation for being imprecise and failing to delineate a "specific area," as called for by the regulation. The Ninth Circuit deferred to the agency, citing *Auer*. *Id.* at 993.

venience—to prevent livestock from wading into critical habitats. See *New Mexico Cattle Growers Ass'n* v. *U.S. Fish & Wildlife Serv.*, 248 F.3d 1277, 1284 n.3 (10th Cir. 2001) ("Due to the fencing, [a rancher] has been forced to reduce the size of his herd . . . [and] the fencing limits his access to river water which causes his significant inconvenience and financial harm."). Similarly, home builders working in critical habitat are often required to set aside large percentages of their property to protect species—property that could be developed into useable home lots.

The reluctance of judges to closely scrutinize agency interpretations due to *Auer*, perhaps in fear of reversal, has led to certainty of only one kind: a determined agency can likely get away with what it wants. Indeed, cases rejecting claims of *Auer* deference are blue-moon cases at best, signaling to the regulated public that there is not much to be gained by trying.

B. *Auer* rewards agencies for promulgating ambiguous regulations

A second well-known critique of the *Auer* doctrine is that it creates perverse incentives:

> [D]eferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government.

Talk Am., 564 U.S. at 69 (Scalia, J., concurring). In a prior dissent joined by Justices Ginsburg, O'Connor, and Stevens, Justice Thomas highlighted this problem with respect to regulations promulgated by the U.S. Department of Health and Human Services:

> [T]he Secretary has merely replaced statutory ambiguity with regulatory ambiguity.

> It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process. Nonetheless, agency rules should be clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law.

Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504, 525 (1994) (5-4) (Thomas, J., dissenting). What agency wouldn't prefer the guarantee of flexibility tomorrow that flows from studiously inserting ambiguity today?

Some agencies indeed have promulgated ambiguous regulations with the purpose of expanding their jurisdiction and with the practical effect of imposing additional costs and burdens on the individuals and businesses that they regulate. See, *e.g.*, *Talk Am.*, 564 U.S. at 69 (Scalia, J., concurring) (noting that the Federal Communications Commission "has repeatedly been rebuked in its attempts to expand the [Telecommunications Act of 1996] beyond its text, and has repeatedly sought new means to the same ends."). The U.S. Army Corps of Engineers (Corps), too, has a long history of promulgating broad and ambiguous regulations having the effect of expanding its jurisdiction when not bound by the rigors of notice-and-comment rulemaking. See *Rapanos* v. *United States*, 547 U.S. 715, 725 (2006) (plurality op.).

The Fourth Circuit, for example, relied on *Auer* to affirm a district court's remediation order requiring homeowners who violated the Clean Water Act (CWA) to fill in a ditch that they dug on their property and to restore it to pre-violation conditions. *United States* v. *Deaton*, 332 F.3d 698, 701-702 (4th Cir. 2003). The homeowners had dug the drainage ditch to obtain a sewage-disposal per-

mit for the construction of a residential subdivision, which had previously been denied precisely because of the "poorly drained" condition of the property. *Id.* at 702. The homeowners deposited excavated dirt alongside the ditch in regulated wetlands on their property. *Ibid.* The government sued the homeowners for failing to obtain a permit to discharge fill materials into "navigable waters" under Section 404(a) of the CWA. *Id.* at 704. The government claimed jurisdiction because the homeowners' wetlands drained into a roadside ditch, which it deemed to be a "tributary" over which it had control because the roadside ditch eventually flowed into the navigable waters of the Wicomico River and Chesapeake Bay. *Id.* at 708. The homeowners, on the other hand, contended that the term "tributary" in the regulation referred not to a ditch, but only to a branch of water that empties "directly into a navigable waterway." *Id.* at 710. Although the Court acknowledged that the regulation in question was ambiguous due to several possible reasonable interpretations of the word "tributary," it did not determine what the best or most rational reading of the regulation was. Instead, it held for the government simply by applying *Auer* deference. *Id.* at 711.[5]

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[5] As a further example of how *Auer* leads to capricious outcomes, in November 2016, two Corps districts completed jurisdictional determinations related to two agricultural operations—one in New York and the other in Illinois. Although each farm has isolated waterbodies and wetlands approximately one mile from the nearest traditional navigable water, the Buffalo District found no significant nexus, and thus no jurisdiction, whereas the Chicago District found a significant nexus. See Van Noble Farms Jurisdictional Determination, available at https://www.lrb.usace.army.mil/Portals/45/docs/regulatory/JDForms/2016-11-Nov/JD-LRB-2016-01169NY.pdf?ver=2016-11-22-101257-237; Kohley Farm Jurisdictional Determination, available at https://www.lrc.usace.army.mil/Portals/36/docs/regulatory/jd/2016/LRC-2016-833jd.pdf.

Reconsideration of *Auer* would allow the Court to rectify this problem.

C. *Auer* causes unfair surprise and frustrates legitimate reliance interests

Auer also lends itself to agency practices that threaten to undermine principles of due process by causing "unfair surprise" or otherwise "seriously undermin[ing] the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'" *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (citation omitted). To be sure, this Court has recognized this problem and authorized paring back the *Auer* doctrine in certain circumstances "when there is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment on the matter in question," such as when an interpretation "conflicts with a prior interpretation," or the interpretation is merely a "convenient litigating position" or a "*post hoc* rationalization ... to defend past agency action against attack." *Id.* at 155 (internal quotations marks and citations omitted). In *SmithKline*, for example, this Court refused to afford *Auer* deference to a U.S. Department of Labor (DOL) interpretation of its regulations that would "impose potentially massive liability ... for conduct that occurred well before that interpretation was announced." *Id.* at 155-156.

Despite these novel safeguards, agencies have still been able to shift interpretations and offer *post hoc* rationalizations under *Auer* to defend agency conduct to the detriment of individuals and businesses. For instance, in *Foster* v. *Vilsack*, the Eighth Circuit upheld the U.S. Department of Agriculture's (USDA's) interpretation of its regulations classifying a 0.8-acre portion of Arlen and Cindy Foster's farmland as wetland, which signif-

icantly affected the Fosters' livelihood.[6] In making the wetlands determination, the USDA examined a comparison site "in the local area" pursuant to 7 C.F.R. § 12.31(b)(2)(ii) because the Fosters had altered or removed vegetation by tilling. The agency's local comparison site was a tract of land over 30 miles away. The Fosters argued that "local area" meant adjacent or in close proximity, but the district court deferred to agency staff's *post hoc* testimony interpreting "local area" to mean anywhere within the *10,835 square-mile* major land resource area (larger than the Commonwealth of Massachusetts) in which the Fosters' farm was located. See *Foster* v. *Vilsack*, No. CIV. 13-4060-KES, 2014 WL 5512905, at *11 (D.S.D. Oct. 31, 2014). The Eighth Circuit affirmed the district court's decision. See *Foster* v. *Vilsack*, 820 F.3d 330, 332-333, 335 (8th Cir. 2016).

Similarly, in *Rivera* v. *Peri & Sons Farms, Inc.*, 735 F.3d 892 (9th Cir. 2013), the Ninth Circuit allowed a Fair Labor Standards Act (FLSA) class action suit to proceed against an employer for conduct that had been acceptable to DOL just one year earlier. For decades, employers were not required to reimburse temporary guest workers for travel expenses until after their work was completed. In 2009, under a new administration, the Department issued contrary guidance that required employers to reimburse workers hired for the H-2B Program within the first week of work. DOL, Field Assistance Bulletin 2009-2, Travel and Visa Expenses of H-2B Workers Under the FLSA 1 (2009). When Peri & Sons, relying on well-established industry practice, failed to pay their workers within the first week, they became the subject of a class action suit.

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[6] Persons determined to have manipulated wetlands into a "converted wetland" may be ineligible to receive farm program payments. *Clark* v. *United States Dep't. of Agric.*, 537 F.3d 934, 935 (8th Cir. 2008).

At the Ninth Circuit, DOL filed an *amicus* brief arguing that Peri & Sons was liable under the agency's new interpretation, even for expenses incurred *before* March 2009. Br. for Sec'y of Labor as *Amicus Curiae* in Supp. of Plaintiffs-Appellants, *Rivera* v. *Peri & Sons Farms, Inc.*, 735 F.3d 892 (9th Cir. 2013) (No. 11-17365), EFC 13. The Department reasoned that its new interpretation "d[id] not create retroactivity concerns" because it "simply clarifie[d] what the law has always meant . . . ." *Id.* at 25. Rather than applying an impartial interpretation of the DOL regulation, the Ninth Circuit deferred to the Department's "clarification." See *Rivera*, 735 F.3d at 899. After this Court denied Peri & Sons' petition for a writ of certiorari, the company settled the class action suit for $2.8 million. *Rivera* v. *Peri & Sons Farms, Inc.*, No. 3:11-cv-00118-RCJ-VPC (D. Nev. Dec. 15, 2015), EFC 182 ([Proposed] Order Granting Final Approval and Collective Action Settlement).

This Court has sought to avoid such "convenient litigating positions" and "*post hoc* rationalization[s]." *SmithKline*, 567 U.S. at 155. Yet the practice persists. Granting this petition would allow the Court to reexamine the *Auer* doctrine and abandon or further limit it to eliminate these improper practices.

D. *Auer* undermines the APA

Finally, *Auer* demonstrably offers an end-run around the APA: it allows agencies to resolve ambiguity by reinterpreting regulations instead of using the APA's notice-and-comment requirements to alter them. See *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring) ("By giving [regulations] *Auer* deference, we do more than allow the agency to make binding regulations without notice and comment. Because the agency (not Congress) drafts the substantive rules that are the object of those interpretations, giving

them deference allows the agency to control the extent of its notice-and-comment-free domain.").

In one case, a sugarcane grower and renewable-energy company challenged Corps guidance on Prior Converted Cropland (PCC). *New Hope Power Co.* v. *U.S. Army Corps of Eng'rs*, 746 F. Supp. 2d 1272, 1284 (S.D. Fla. 2010). Joint regulations of the Corps and EPA provide that PCC will not be regulated as among the "waters of the United States" under the CWA. 33 C.F.R. § 328.3(b)(2). In the final rule promulgating the PCC regulations, the agencies specifically stated that land will retain its PCC status regardless of use, unless abandoned. 58 Fed. Reg. 45,008, 45,033-45,034 (Aug. 25, 1993). A Florida field office of the Corps, however, circulated guidance providing that shifting PCC to a non-agricultural use would immediately result in the land losing PCC status. *New Hope*, 746 F. Supp. 2d at 1284. Through that guidance, the Corps substantially expanded the scope of land and water features deemed to be "waters of the U.S.," and thereby its jurisdiction, without complying with the APA's notice-and-comment process. New Hope challenged the guidance, and a district court set aside the guidance because it constituted a substantive rule issued without following required procedures under the APA. *Ibid.*

Despite this opinion from the *New Hope* district court, the Corps continues to issue jurisdictional wetland determinations on PCC lands that are used for non-agricultural purposes, forcing landowners to accept those determinations or file suit. See, *e.g.*, *Belle Co.* v. *U.S. Army Corps of Eng'rs*, 761 F.3d 383, 397 (5th Cir. 2014) (distinguishing *New Hope* and finding the jurisdictional determination non-reviewable). In these circumstances, owners of PCC lands must either accept the Corps' jurisdictional determination or expend significant resources to litigate the same issue in a different forum.

Overcoming litigation fatigue in the face of such agency tenacity requires no small effort, and *Auer* paves the way for agencies, if they so choose, to push beyond the scope of their authorized power and insulate their actions from judicial scrutiny.

II. *AUER*'S HIDDEN HARMS ARE NO LESS REAL

The reported cases discussed above illustrate how *Auer* can unsettle expectations and shift power from the judiciary to agencies. But these harms are the tip of the iceberg and ignore the distinct harms to the regulated community imposed by *Auer*'s chilling effect. In many of the cases employing *Auer* deference, judges expressly acknowledge *Auer*'s dubious foundation, but then surrender, as they must, to this Court's precedent. See, e.g., *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions").

Even when a regulated entity may have a powerful argument that *Auer* should not apply, dislodging the common judicial predisposition to simply defer under *Auer* is a formidable challenge. Indeed, due to this hurdle, businesses often will not even explore the possibility of litigating whether the agency's interpretation of its own regulation is plainly erroneous. By forestalling legitimate challenges to agency action, *Auer* eliminates a crucial check on administrative overreach, eroding the APA's clear intent that anyone "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial relief thereof." 5 U.S.C. § 702. It likewise erodes the judiciary's role in maintaining the separation of powers.

Amici's members are routinely subjected to an ever-

changing web of regulatory interpretations strewn throughout the Federal Register, policy directives, guidelines, memoranda of understanding, circulars, handbooks, and informal statements from agency staff. This has produced substantial uncertainty within the regulated community as agencies continue to promulgate regulations that they can interpret (or re-interpret) later. And this has forced *amici*'s members to take risks that should not be required.

For example, even though there is a statutory exemption for certain farming and ranching activities that is reflected in CWA regulations, many of *amici*'s members are forced to obtain permits under Section 404 of the CWA to discharge dredge or fill materials into waters of the U.S. while engaging in such activities or face the risk of significant legal and financial consequences.[7] Members of this Court have recognized that the burden asso-

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[7] The statute exempts "normal" farming or ranching activities, "such as plowing . . . [or] cultivating . . . ." 33 U.S.C § 1344(f)(1)(A); 33 C.F.R. §§ 323.4(a)(1)(iii)(A) ("Cultivating means physical methods of soil treatment employed within established farming [or] ranching . . . ."); 323.4(a)(1)(iii)(D) ("Plowing means all forms of primary tillage . . . for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops."). The term "normal" is not defined, but for something to qualify as "normal" farming, silviculture and ranching activity, it must be part of an "established (i.e. on-going)" operation and cannot bring an area into a new "use." 33 C.F.R. § 323.4(a)(1)(ii).

To this day, federal regulations are unclear about what constitutes an "established (i.e. on-going)" operation and on how far back in time the operation must be "established." As a result, farmers and ranchers continue to face enforcement actions and hefty civil fines if they fail to obtain a CWA Section 404 permit. Many do not know if they are required to do so. And if the Corps decides to pursue an enforcement action, many farmers and ranchers are likely to seek quick settlements rather than resist because their economic livelihood depends on a successful grazing or growing season.

ciated with obtaining these permits "is not trivial," as the "Corps of Engineers [] exercises the discretion of an enlightened despot" and the "average applicant for an individual permit spends 788 days and $271,596 in completing the process." *Rapanos*, 547 U.S. at 721.[8]

Over the years, EPA and the Corps have interpreted what qualifies as "normal" or a "new use" not by giving a clear (if multifaceted) definition after careful analysis and public comment, but through a series of regional manuals, circulars, and—troublingly—enforcement actions. The agencies have been threatening farmers and ranchers with potentially ruinous civil and criminal penalties for plowing their own lands and switching between ranching and farming activities.

The same is true across the business world, where time-is-money and profit margins can be razor thin. Challenges are almost certainly doomed to fail, so it is hardly surprising that most entities simply opt not to fight. A perceived willingness to rigorously apply *Auer* communicates that courts are unwilling to ensure that laws are applied as written. This Court should reconsider *Auer*, direct lower courts to refuse deference when an agency seeks to exploit *its own regulations'* vagueness, and require agencies to adhere to the written law unless and until a proper and rigorous new regulation is adopted under the APA.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[8] In *Rapanos*, regulators informed the plaintiff that the wetlands he backfilled were "waters of the United States," and that his action required a permit. Twelve years of criminal and civil litigation ensued—"for backfilling his own wet fields, Mr. Rapanos faced 63 months in prison and hundreds of thousands of dollars in criminal and civil fines." *Rapanos*, 547 U.S. at 721.

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